UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

ANELDA ANNETTE MACARTHUR,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 01-141-P-C***
	)	
LARRY G. MASSANARI,	***)***	
Acting Commissioner of Social Security,[1]	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[2]

This Social Security Disability ("SSD") and Supplemental Security Income ("SSI") appeal raises the question whether substantial evidence supports the commissioner's determination that the plaintiff, who suffers from back and leg pain and depression, is capable of performing substantially the full range of light work. I recommend that the decision of the commissioner be affirmed.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff suffered from lower back pain and right sciatica, right leg pain and depression, impairments that were severe but did not meet or equal

[1] Pursuant to Fed. R. Civ. P. 25(d)(1), Acting Commissioner of Social Security Larry G. Massanari is substituted as the defendant in this matter.

[2] This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on November 20, 2001, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

those listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the "Listings"), Finding 3, Record at 19; that the plaintiff's statements concerning her impairments and their impact on her ability to work were not entirely credible, Finding 4, *id*.; that she was unable to perform her past relevant work as a personal care attendant, certified nurse's assistant and cashier, Finding 6, *id*. at 20; that her capacity for the full range of light work was somewhat diminished by her restriction from bending repeatedly and her slightly limited capacity for sustained concentration, Finding 7, *id*.; that, given her age (53), education (high school and vocational training as a certified nurse's assistant), work experience (unskilled and semi-skilled, with no transferable work skills) and residual functional capacity, Rule 202.14 of Table 2, Appendix 2 to Subpart P, 20 C.F.R. § 404 (the "Grid") would direct a conclusion that she was not disabled, Findings 8-11, *id*.; that, although she was unable to perform the full range of light work, she was capable of making an adjustment to work existing in significant numbers in the national economy, Finding 12, *id*.; and that she therefore had not been under a disability at any time through the date of decision, Finding 13, *id*. The Appeals Council declined to review the decision, *id*. at 6-7, making it the final determination of the commissioner, 20 C.F.R. §§ 404.981, 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge reached Step 5 of the sequential process, at which stage the burden of proof shifts to the commissioner to show that a claimant can perform work other than her

past relevant work. 20 C.F.R. §§ 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence in support of the commissioner's findings regarding the plaintiff's residual work capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

The plaintiff complains that the administrative law judge (i) failed to evaluate or consider the side effects of her medication and (ii) made a residual functional capacity ("RFC") finding unsupported by substantial evidence of record. Statement of Specific Errors ("Statement of Errors") (Docket No. 3) at 1-6. She seeks remand for further consideration. *Id*. at 3, 7. I am unpersuaded that remand is warranted.

I. Discussion

A. Medication Side Effects

In her first statement of errors, the plaintiff points out that the administrative law judge failed to evaluate or even consider the side effects she testified resulted from taking the medication Percocet. *Id*. at 2-3. While this is indeed the case, *see* Record at 15-20, the omission under the circumstances is harmless. The plaintiff testified that she had been prescribed Percocet to control pain from a bulging disc and identified its side effects as "problems with bowels," sleepiness and a feeling of fuzziness. *Id*. at 34-35, 37-38. Nonetheless, no medical evidence of record indicates that the plaintiff ever complained of, or suffered from, bowel problems or fuzziness attributable to Percocet or that Percocet is known to cause such problems.

The plaintiff is noted to have complained once, on August 27, 1999, to treating physician Larry Lee Newman, M.D., that "she feels tired mosetly [sic] in the afternoon, her concern is medication effect." *Id*. at 263, 249. Yet, there is no indication whether Dr. Newman agreed that Percocet was the culprit, *id*., and the record is barren of any other medical evidence that Percocet does in fact cause

such a side effect.[3] The administrative law judge thus supportably could have chosen not to credit the plaintiff's testimony regarding Percocet's side effects.[4]

B. RFC Finding

The plaintiff next argues that the administrative law judge improperly found that she could perform substantially the full range of light work, (i) failing to consider the side effects of her medication, (ii) discounting the severity of her back pain on the basis of the denial of a workers' compensation claim, (iii) omitting any discussion of fibromyalgia, and (iv) underestimating the impact of her depression by focusing only on the positive aspects of a psychological consultant's report. Statement of Errors at 3-6. The plaintiff contends that in view of her non-exertional impairments, particularly her fatigue, loss of interest/concentration and side effects of medication, the administrative law judge should have called a vocational expert rather than relying on the Grid as a "framework." *Id*. at 6. Finally, she asserts that the administrative law judge "points to no affirmative evidence stating that [she] has a residual functional capacity for light work." *Id*. at 6-7.

I address each of these points, none of which I find to have merit, in turn:

1. For the reasons discussed above, the failure of the administrative law judge to address the side effects of the plaintiff's medication was in this case harmless.

[3] At oral argument, counsel for the plaintiff clarified that he was not arguing that the plaintiff's self-report to Dr. Newman was medical evidence, but rather that the self-report was sufficient to put the administrative law judge on notice that the issue of claimed side effects warranted consideration and discussion.

[4] The plaintiff relies for this portion of her argument on *Figueroa v. Secretary of Health, Educ. & Welfare*, 585 F.2d 551 (1st Cir. 1978), in which the First Circuit vacated an administrative law judge's decision and remanded for further proceedings based on failure to address the appellant's claim of disabling side effects from seizure medication, *id*. at 553-54. Although in *Figueroa* (as here) the appellant presented no medical evidence corroborating this claim, the case is distinguishable in that (i) the appellant had appeared *pro se*, (ii) the Secretary's own regulations recognized that seizure medication might create problems if "unusually large doses" were required, and (iii) the appellant claimed the side effects were, in themselves, so severe as to be disabling. *Id*. I take further comfort in the holding of a later unpublished First Circuit opinion that "[W]e are in no way troubled by claimant's objection that the ALJ impermissibly ignored her testimony that the side-effects of her medications made her too sleepy to engage in work activity. There was no mention of this problem anywhere in the medical evidence. In the absence of any medical evidence, the ALJ was entitled to disregard claimant's testimony." *De Jesus v. Secretary of Health & Human Servs.*, 1992 WL 137507, at **3 (1st Cir. June 19, 1992).

2. The administrative law judge did not discount the severity of the plaintiff's back pain based on the workers' compensation denial; rather, he observed, "Although the claimant alleges that she incurred a work-related back injury in August 1997, her workers' compensation claim was denied." *Id*. at 15-16. The administrative law judge went on to discount the severity of the plaintiff's back pain on the basis of the objective medical evidence – namely, an October 1997 MRI finding early degenerative disc disease and facet arthropathy with no disc herniation and a November 1997 x-ray report revealing a normal lumbo-sacral spine. *Id*. at 17; *see also id*. at 272 (interpretation of MRI), 273 (interpretation of x-ray).

3. While the administrative law judge did omit any mention of fibromyalgia, *see id.* at 15-20, the omission is again harmless. The only evidence of fibromyalgia is a note by Dr. Newman dated January 4, 2000 stating under the subheading "A" (for "assessment"): "polyarticular arthralgias, depression, probable fibromyalgia equivalent . . . ." *Id*. at 247. From this one cannot extract a definitive diagnosis of fibromyalgia; rather, there is a "probable . . . equivalent." Further, Dr. Newman does not in this note (or, inasmuch as appears, anywhere else in the Record) discuss the basis for this assessment (including any diagnostic tool used or any signs or symptoms observed that would be consistent with such a diagnosis). The plaintiff was not herself aware that she was diagnosed as having fibromyalgia; when asked specifically about it at her hearing on February 10, 2000, she testified that she did not know what it was and did not remember her doctor ever mentioning it to her. *Id*. at 35. Given the lack of definitive diagnosis, supporting data or any other mention of record of fibromyalgia, as well as the lack of any indication that Dr. Newman possesses expertise in the diagnosis and treatment of that condition, the administrative law judge properly could have concluded (albeit *sub silentio*) that the diagnosis was entitled to little weight. *See, e.g.*, 20 C.F.R. §§ 404.1527(d)(3)-(5), 416.927(d)(3)-(5) (the "more a medical source presents relevant evidence to

support an opinion, particularly medical signs and laboratory findings," the "better an explanation a source provides for an opinion" and the "more consistent an opinion is with the record as a whole," the more weight is given to that opinion; more weight also accorded "the opinion of a specialist about medical issues related to his or her area of specialty").

4. The administrative law judge did not, on the whole, improperly pick and choose in summarizing the findings of consulting psychologist Edward Quinn, Ph.D. He properly focused on the portion of Dr. Quinn's opinion (titled "Medical Source Statement") specifically addressing "Mrs. MacArthur's ability to perform employment activities." *Compare* Record at 17 *with id*. at 169.

5. The administrative law judge did not, in this case, err in relying on the Grid in view of the plaintiff's nonexertional impairments (in particular, according to the plaintiff, her medication side effects, fatigue and loss of interest/concentration). The commissioner may continue to rely exclusively on the Grid if "a non-strength impairment . . . has the effect only of reducing [the relevant] occupational base marginally[.]" *Ortiz v. Secretary of Health & Human Servs.*, 890 F.2d 520, 524 (1st Cir. 1989). As previously discussed, the plaintiff's claimed side effects supportably were discounted. As regards loss of interest/concentration, fatigue and other psychological problems noted by Dr. Quinn, two non-examining psychological consultants reviewing the Quinn report rated the plaintiff's mental conditions as causing essentially only a "slight" degree of functional limitation. Record at 188 (rating by Scott W. Hoch, Ph.D.), 245 (rating by David R. Houston, Ph.D.). The First Circuit has found even "moderate" restrictions in mental RFC categories not to compromise a claimant's capacity for the full range of unskilled work significantly enough to preclude reliance on the Grid. *Ortiz*, 890 F.2d at 527-28.[5]

[5] At oral argument, the plaintiff's counsel relied on *Willey v. Heckler*, 607 F. Supp. 576 (D. Me. 1985), for the proposition that, absent in-depth findings and analysis concerning the role of nonexertional impairments in a claimant's residual functional capacity, an administrative law judge may not rely on the Grid to make a determination of non-disability. *See also* Statement of Errors at 6. In
(continued on next page)

6. The plaintiff's argument notwithstanding, the administrative law judge did allude to affirmative evidence of record that she retained the physical RFC to perform light work. *See* Record at 18 (noting that "[a]fter considering the testimony and the medical evidence of record" plaintiff found capable of meeting exertional demands of light work; "evidence supports a finding that she is not able to lift and carry more than 20 pounds or more than ten pounds on a regular basis"); 172 (RFC assessment of exertional limitations by Robert Hayes, D.O.), 231 (RFC assessment of exertional limitations by Lawrence P. Johnson, M.D.).

II. Conclusion

For the foregoing reasons, I recommend that the decision of the commissioner be **AFFIRMED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 26th day of November, 2001.

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David M. Cohen
United States Magistrate Judge

Willey, the "ALJ's application of the Grid was based in part on [a] vocational expert's findings that Claimant ha[d] skills that [were] transferable." *Willey*, 607 F. Supp. at 578. "The vocational expert's determination of transferability, however, was not informed by adequate information concerning Claimant's exertional and nonexertional impairments," rendering the expert's conclusions "neither relevant nor reliable." *Id*. *Ortiz*, which involved an administrative law judge's implicit determination that certain nonexertional impairments were not significant enough to erode reliance on the Grid, is more closely on point. *See Ortiz*, 890 F.2d at 525 ("The claimant here suffered from two principal nonexertional impairments: (1) a restricted ability to bend from the waist, and (2) a dysthymic disorder. The ALJ, while not addressing the matter explicitly, inferably determined that these ailments, either alone or in combination, were not sufficiently severe to necessitate the taking of vocational testimony. Although the matter is not entirely free of doubt, and although the ALJ's opinion is subject to certain ambiguities, we think the medical evidence was adequate to support such a determination in each instance.") (footnote omitted).